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No. 81-94

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH J. REY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he should have been allowed to take an immediate appeal from the district court's denial of his motion to dismiss the indictment on the ground that the evidence at his first trial was insufficient.

1. Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and three counts of using the telephone with intent to commit a narcotics of-

fense, in violation of 21 U.S.C. 843(b). After trial, the district court granted petitioner's motion for a judgment of acquittal on two of the substantive counts,[1] but it denied the motion with respect to the conspiracy count and the other substantive count. However, the court granted petitioner's motion for a new trial on those counts because of arguably improper jury instructions (Pet. App. 5-6).

Prior to his second trial, petitioner filed a "plea in bar," claiming that because of governmental misconduct during the investigation of the case and insufficient evidence during the first trial, due process and double jeopardy principles prohibited the government from retrying him on the two remaining counts (Pet. App. 6-7). After finding the government's evidence to be sufficient (*id.* at 14), the district court denied the motion. Petitioner then attempted to take an interlocutory appeal from that denial.

2. The court of appeals dismissed the appeal in part and affirmed the district court's order in part. First, the court held that petitioner could not take an immediate appeal from the portion of the district court's order holding that his second trial was not barred by government misconduct during the investigation. Due process claims, the court held, do not fall within the narrow range of claims that can be raised on interlocutory appeal (Pet. App. 7-10). Second, the court held that petitioner could not appeal from that portion of the district court's order rejecting his claim that the evidence at the first trial was insufficient. That portion of the appeal, the court stated, was in effect an effort to obtain review of the

[1] The court had dismissed a third substantive count during the trial.

district court's failure to grant a judgment of acquittal at the conclusion of the first trial, an order that could not be challenged on an interlocutory basis (Pet. App. 11-14). Finally, the court of appeals held that there was no merit to petitioner's claim that he should also be acquitted on the remaining substantive count because a conviction would be barred by his acquittal on the other substantive counts at the first trial. While the court held that this claim was reviewable on an interlocutory basis, it concluded that there was no inconsistency between the district court's acquittal of petitioner on three of the substantive counts and its order that petitioner be retried on the remaining substantive count (Pet. App. 15-18).[2]

3. Petitioner contends (Pet. 5-10) that, under *Abney* v. *United States*, 431 U.S. 651 (1977), he was entitled to immediate appellate review of the district court's pretrial ruling denying his motion to dismiss the indictment. According to his submission, *Abney* requires the court of appeals to decide, before any retrial, whether the evidence presented by the government during the first trial was legally sufficient to

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[2] The district court acquitted petitioner on three of the substantive counts (one during trial and the other two after trial) because the telephone conversations at issue in each of those counts involved sham heroin. The telephone conversation at issue in the remaining substantive count, however, involved real heroin, and could thus support a valid conviction (Pet. App. 16-17).

We note our disagreement with the court of appeals' conclusion that collateral estoppel claims should be reviewable prior to final judgment. As we view such claims, they assert a right not to be *convicted*, rather than a right not to be *tried*, and therefore are capable of adequate vindication on appeal from a final judgment. We do not, however, ask the Court to consider the issue in this case.

sustain a conviction. In the absence of such a determination, petitioner claims, he may not be retried consistent with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978). For the reasons set forth in the opinion of the court of appeals (Pet. App. 11-14), petitioner's claim is without merit.

In *Abney*, this Court determined that a double jeopardy claim was reviewable on an interlocutory basis. The defendants in *Abney* asserted that, because the original indictment against them had been "duplicitous" and the jury had returned a general verdict of guilty, the jury may have acquitted them on one of the charges contained in the duplicitous indictment while convicting them on the other. They contended that the Double Jeopardy Clause barred their retrial following reversal of their conviction on appeal, in light of this possible "acquittal" by the jury. 431 U.S. at 664.

Abney concluded that this double jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659. The Court emphasized that the "defendant makes no challenge whatsoever to the merits of the charge against him" (*ibid.*). It also observed that the "elements of [the double jeopardy] claim are completely independent of his guilt or innocence" (*id.* at 660). Since the order challenged on appeal was completely "collateral" to the issue of guilt or innocence, and since effective relief could not be afforded on review following final judgment after retrial, the Court approved immediate review.

Abney also held, however, that other claims asserted by the defendant could not be appealed on an interlocutory basis. In particular, this Court re-

jected the assertion that a defendant in a criminal case is entitled to interlocutory review of a pretrial order sustaining the indictment (431 U.S. at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.[3]

The decision of the district court in this case, ruling that the government had presented sufficient evidence to justify a finding of guilt, is a classic example of a pretrial order that "goes to the very heart of the issues to be resolved at * * * trial." Rather than being "completely independent of [the issue of] guilt or innocence," the challenged order relates directly and exclusively to the merits of the prosecution. As the court of appeals explained (Pet. App. 11-12):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *

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[3] *Abney* thus reaffirmed the well established rule that a pretrial order that does not meet the standards of a "collateral order," as prescribed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not subject to an immediate appeal. This is true even though reversal of the order on appeal would obviate the need for a trial. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850, 860 & n.7 (1978); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940). Immediate review is not available to test claims that are "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 9.

> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

On this basis, the courts of appeals repeatedly have concluded that a "denial of a motion for acquittal is not a final, appealable decision [under *Abney*] even when made after a hung jury mistrial." *United States* v. *Carnes*, 618 F.2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *United States* v. *Ellis*, 646 F.2d 132, 134-135 (4th Cir. 1981); *United States* v. *Young*, 544 F.2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). In light of these precedents, the court below correctly dismissed petitioner's appeal from the district court's denial of his motion to dismiss the indictment.[4]

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[4] Contrary to petitioner's contention (Pet. 9), there is no conflict among the circuits on this issue. None of the cases petitioner cites (Pet. 9-10) involved double jeopardy claims that were premised on an asserted insufficiency of the government's evidence at the first trial. In each of those cases (except *United States* v. *Venable*, 585 F.2d 71 (3d Cir. 1978)), the double jeopardy issue was based on a claim that misconduct by the prosecutor during the first trial had caused a mistrial, and that a second trial therefore should not be permitted. The *Venable* case involved a claim of collateral estoppel, not a claim based on the alleged insufficiency of the government's evidence at the first trial. Thus, in none of the cited cases was the court of appeals asked to assume the substantial burden of reviewing the sufficiency of the government's evidence at an interlocutory stage in the proceedings in the district court.

If, moreover, interlocutory review were available to evaluate the sufficiency of the government's evidence in every

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

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case in which the district court granted a retrial on the basis of erroneous jury instructions or similar trial error, the delay introduced in criminal prosecutions would be substantial. In a large category of cases, criminal defendants would be empowered to delay their retrials while they prosecuted interlocutory appeals in the courts of appeals and sought review by certiorari in this Court. That would be inconsistent with previously recognized limitations on the "collateral order doctrine," which applies only to "a small class" of interlocutory orders and is a "narrow exception" to the final judgment rule. *Firestone Tire & Rubber Co.* v. *Risjord, supra,* slip op. 6.

[5] This Court recently has denied certiorari in two cases raising the same issue. See *Kuhn* v. *United States,* No. 80-1715 (June 8, 1981); *Hannigan* v. *United States,* No. 80-1165 (Mar. 9, 1981).

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